

EXPOSED TO THE ELEMENTS: WORKERS' COMPENSATION AND UNAUTHORIZED FARM WORKERS IN THE MIDWEST

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I. Introduction	263
II. General Philosophy & Historical Development of Workers' Compensation	266
A. Agricultural Exceptionalism and Workers' Compensation Systems in the Heartland States.....	268
B. Agricultural Employers' Upper Hand over Unauthorized Farm Workers.....	269
III. The Physical and Chemical Dangers of Farm Work.....	272
A. Physical Injuries and Dangers Threatening Hired Farm Labor	272
B. Chemical Injuries and Dangers Threatening Hired Farm Labor	274
IV. Unauthorized Workers' Protections in Court.....	278
A. Federal Immigration and Labor Policy in Hoffman Plastic	279
B. Unauthorized Employees and Workers' Compensation in the Heartland	280
V. Conclusion	284

I. INTRODUCTION

Illegal, undocumented, pioneer – regardless of the label, the United States is coming to terms with the fact that unauthorized immigrants make up a significant portion of the labor market.² Recent studies stemming from a joint survey by the U.S. Census Bureau and Bureau of Labor Statistics place the unauthorized immigrant population between 11.5 to 12 million.³ Logically, most unauthorized workers come from Mexico or other Latin American countries for

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2. See *Illegal Immigrants Expanding Footprint*, USA TODAY, Mar. 29, 2006, available at http://www.usatoday.com/news/washington/2006-03-29-immigration-debate_x.htm.

3. JEFFREY S. PASSEL, PEW HISPANIC CENTER, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (2006), <http://pewhispanic.org/reports/report.php?ReportID=61>.

economic and lifestyle reasons.⁴ The opportunity for an unauthorized immigrant to make several times the paycheck he would earn in his home country is reason enough to make the journey to the United States regardless of job training or education level.

Naturally, many unauthorized workers find employment in the agricultural sector. In 2002, the Pew Center for Hispanic Studies estimated the number of unauthorized workers in agriculture at 1.2 million.⁵ In the same year, the United States Department of Agriculture (USDA) estimated the total number of workers in farm production at 3,074,946, with 885,989 of those individuals as wage or salaried workers.⁶ Seventy-five percent of all hired crop farm workers were born in Mexico; the majority immigrated from the provinces of Guanajuato, Michoacán, and Jalisco.⁷ An additional two percent were from Central American countries.⁸ Further, fifty-three percent of the hired crop labor force was undocumented, and as of 2002 only thirty-three percent of unauthorized agricultural workers were likely to report being covered by workers' compensation, compared to sixty-five percent of authorized workers.⁹

Moreover, agriculture is the second most dangerous occupation in the United States according to occupational fatality rates.¹⁰ In 2005, non-fatal injuries in the agricultural sector were estimated at 22,400 and 13,100 for crop production and animal production, respectively.¹¹ The number of unauthorized farm workers, the high statistics of agricultural-related injuries and deaths, and the lack of workers' compensation coverage for unauthorized workers add up to create a rather vulnerable workforce.

4. See Marcela Sanchez, *For Hispanics, Poverty is Relative*, WASH. POST, Oct. 22, 2006, at B7.

5. B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CENTER, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.—MEXICO MIGRATION TALKS 8 (2002), <http://pewhispanic.org/files/reports/6.pdf> (citing study by Dr. Philip Martin).

6. ECON. RESEARCH SERV., USDA, UNITED STATES FARM AND FARM-RELATED EMPLOYMENT, 2002 (2005), <http://www.ers.usda.gov/Data/FarmandRelatedEmployment/> (in the "Geographical Area" click on "United States Summary;" then under "Year" click on "2002;" then click "Submit").

7. U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 3-4 (2005), http://www.doleta.gov/agworker/report9/naws_rpt9.pdf.

8. *Id.* at 3.

9. *Id.* at 3, 41.

10. Press Release, Bureau of Labor Statistics, National Census of Fatal Occupational Injuries in 2005, 4 (Aug. 10, 2006), http://www.bls.gov/news.release/archives/cfoi_08102006.pdf.

11. Press Release, Bureau of Labor Statistics, Workplace Injuries and Illnesses in 2006 (Oct. 16, 2007), <http://www.bls.gov/news.release/pdf/osh.pdf> (See Table 2, under "Total Recordable Cases").

In this Note, I address whether unauthorized agricultural workers who suffer injury in the course of agricultural employment should have the right to bring workers' compensation claims under state workers' compensation statutes in the Heartland states and the U.S. Supreme Court ruling in *Hoffman Plastic Compounds, Inc. v. NLRB*.¹² *Hoffman Plastics* addressed a conflict between the remedial powers of the National Labor Relations Board (NLRB)¹³ and federal immigration policy,¹⁴ but more broadly called into question unauthorized workers' protections.¹⁵ Many state workers' compensation statutes do not provide agricultural workers the right to claim workers' compensation.¹⁶ State workers' compensation statutes and federal immigration policies converge to create a loophole that leaves unauthorized agricultural workers subject to exploitation.

This Note advocates that providing the right to claim state workers' compensation for unauthorized farm labor will assist in ending instances of farm labor exploitation and improve working conditions for *all* farm workers. Workers' compensation claims brought by unauthorized farm workers will deter employers from injurious labor practices and conditions due to the potential for increased labor costs. Part I begins by noting the socialist philosophy and historical development of workers' compensation. It then examines the early statutory construction of these laws in New York and subsequent litigation in achieving broad acceptance in the U.S. The focus then shifts to workers' compensation systems within the agricultural context; specifically, how agricultural employers

12. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

13. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

14. See *Hoffman Plastic*, 535 U.S. at 140; see also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984).

15. See, e.g., *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003) (holding that the Immigration Reform Control Act does not preclude states from awarding workers' compensation benefits to illegal aliens); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003) (Texas law allows recovery of damages, regardless of citizenship status.). But see *Felix v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 986 P.2d 161, 164 (Wyo. 1999) (holding that an alien not authorized to work by INS was not an "employee" under Wyoming law, and therefore was not entitled to workers' compensation benefits).

16. See, e.g., KAN. STAT. ANN. § 44-505(a)(1) (2006) (providing an exception for "[a]gricultural pursuits and employments incident thereto"); MO. ANN. STAT. § 287.090(1) (West 2007) (generally not applicable to "farm labor"; farm labor not defined by statute); N.D. CENT. CODE § 65-01-17 (2005) (exempting agricultural employers that engage in customary agricultural operations defined as "[t]he planting, care, or harvesting of grain or field crops on a contract-for-hire basis, exclusive of hauling by special contractor . . . , unless the employer's custom agricultural operations are based outside [the] state or require more than thirty actual working days of operation during the calendar year").

in the Heartland states¹⁷ have the ability to manipulate the system to exploit their employees who are, statistically, illegal immigrants.

Part II addresses dangers unique to agricultural work and how administrative statutes, such as OSHA and FIFRA, regulate farm safety. It describes relevant statistics indicating under-enforcement of farm safety regulations and further demonstrates the need for hired farm worker coverage under workers' compensation. Part III discusses pertinent cases regarding unauthorized worker claims under state workers' compensation statutes and analyzes those decisions in light of the purpose of the Immigration Reform and Control Act ("IRCA"). Lastly, it emphasizes the deterrent economic effect workers' compensation would have on employers who hire unauthorized immigrants to improve working conditions and stop abusive labor practices.

II. GENERAL PHILOSOPHY & HISTORICAL DEVELOPMENT OF WORKERS' COMPENSATION

Germany was the first country to substantially develop workers' compensation.¹⁸ During the years 1883-1887, the Reichstag passed a workers' compensation scheme involving compulsory insurance.¹⁹ The system was grounded in social philosophies of thinkers such as Fichte, Hegel, and Marx, and stated that many misfortunes and accidents are not individual, but social in origin; therefore, the state should be filled with "Christian concern" for the weak and disabled.²⁰ Likewise, England passed the Employer's Liability Act in 1880.²¹ This was supplanted by the Workmen's Compensation Act of 1897 that covered "personal injury by accident arising out of and in the course of employment," the legal standard found in most workers' compensation laws today.²²

The United States drew from these labor movements in developing its system of workers' compensation.²³ In 1910, New York became the first state to pass a mandatory workers' compensation law applicable to "hazardous" employments, replacing the traditional tort causes of action under which employees

17. For purposes of this article, "The Heartland" consists of Iowa, Minnesota, Wisconsin, Nebraska, Kansas, Missouri, North Dakota, South Dakota and Illinois.

18. PETER M. LENCIS, *WORKERS COMPENSATION: A REFERENCE AND GUIDE* 10 (1998).

19. ARTHUR LARSON, *WORKERS' COMPENSATION LAW: CASES & MATERIALS* 23 (1984).

20. *Id.* (quoting U.S. DEP'T. OF LABOR, *FOURTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR: COMPULSORY INSURANCE IN GERMANY* 20 (1893)).

21. Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 787 (1982) (citing 43 & 44 Vict., ch. 42).

22. *Id.* at 797 (quoting 60 & 61 Vict., ch. 37).

23. LARSON, *supra* note 19, at 22.

formerly had to sue.²⁴ This shifted the burden of injury to the employer, requiring that financial benefits be paid to the injured or the family of the deceased employee, regardless of fault.²⁵ This act was quickly ruled unconstitutional in 1911 on due process grounds under the Fourteenth Amendment because it stripped employers of property by automatically forcing payment of benefits to injured employees or their families.²⁶

Soon after, New York amended its constitution to allow a compulsory compensation law in 1914.²⁷ The constitutional amendment and related workers' compensation statute were upheld by the U.S. Supreme Court in 1917. In *New York Central Railroad Co. v. White*, the Court recognized an employer's obligation to bear the cost of recompensing an injured employee for his disability or his family through death benefits as part of the course of business.²⁸ Further, the New York workers' compensation scheme provided ample due process for an employer through procedural mechanisms, and as a result avoided conflict with the Fourteenth Amendment.²⁹

During this same time period (1910-1917), Iowa and other states nationwide took note of the legal conflict between compulsory compensation and due process of law, and passed elective workers' compensation statutes.³⁰ Generally, elective workers' compensation statutes allow the employer or employee to expedite their suit through workers' compensation administrative systems in place of court, but also bar the employer from use of common law defenses such as assumption of risk or contributory negligence if the suit is filed and judged in court.³¹ This statutory design was upheld in *Hawkins v. Bleakly* as a companion case on the same day as *White*.³² In both cases the Court acknowledged the exclusion of farm laborers from workers' compensation,³³ but dismissed the exclusion as an equal protection issue because "the risks inherent [in farming] are exceptionally patent, simple, and familiar."³⁴

24. LENCISIS, *supra* note 18, at 11-12.

25. *Id.* at 12.

26. *Id.*; *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 298 (1911).

27. LENCISIS, *supra* note 18, at 12; N.Y. CONST. art. I, § 18 (renumbered 1938).

28. *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 203-04, 208 (1917).

29. *Id.* at 207-08.

30. LARSON, *supra* note 19, at 26-27.

31. 82 AM. JUR. 2D *Workers' Compensation* §§ 41-42 (2007) (citing *Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919) (citations omitted)).

32. *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *White*, 243 U.S. 188.

33. *Hawkins*, 243 U.S. at 212; *White*, 243 U.S. at 192.

34. *White*, 243 U.S. at 208.

A. *Agricultural Exceptionalism and Workers' Compensation Systems in the Heartland States*

Most states in the Heartland passed workers' compensation statutes by 1920; and by 1949, every state in the Union had enacted workers' compensation laws.³⁵ Initially, many of the Heartland states' statutes excluded agriculture entirely.³⁶ Generally, smaller agricultural operations remain exempt, though various criteria have been legislated over the years that marginally qualify farm workers under workers' compensation acts.³⁷ Several reasons have been identified for excluding farm workers. Supposedly, they do not need the protection of

35. NEIL E. HARL, 3 *Agric. L.* § 20.02[1] (2006); LARSON, *supra* note 19, at 28.

36. *See, e.g.*, 820 ILL. COMP. STAT. ANN. 305/3-19 (West 1913) (amended 1961) (The 1913 act read, "Nothing contained herein shall be construed to apply to any work . . . conducted by farmers and others engaged in farming . . . for any such purposes, or to any one in their employ or to any work done on a farm . . . no matter what kind of work or services is being done or rendered."); IOWA CODE ANN § 85.1(3) (West 1913) (amended 1976) (The 1939 act did not apply to "[p]ersons engaged in agriculture, insofar as injuries shall be incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith, whether on or off the premises of the employer.").

37. KAN. STAT. ANN. § 44-505(a)(1) (2007) (providing an exception for "agricultural pursuits and employments incident thereto"); NEB. REV. STAT. § 48-106(2)(d) (2007) (workers compensation act does not apply to an employer "engaged in an agricultural operation . . . [unless he] employs ten or more unrelated, full-time employees . . . on each working day for thirteen calendar weeks, whether or not such weeks are consecutive . . . [and] shall apply to an employer thirty days after the thirteenth such week"); N.D. CENT. CODE § 65-01-17 (2007) (exempting agricultural employers that engage in customary agricultural operations defined as "the planting, care, or harvesting of grain or field crops on a contract-for-hire basis, exclusive of hauling by special contractor . . . unless the employer's custom agricultural operations are based outside [the] state or require more than thirty . . . days of operation during [a] calendar year"); IOWA CODE § 85.1(3) (2008) (providing exceptions for children and spouses of agricultural employers, but including employers "whose total cash payroll to one or more persons other than those exempted . . . amount[] to two thousand five hundred dollars or more during the preceding calendar year"); MINN. STAT. ANN. §§ 176.041(1)(b), 176.011(11a)(a) (West 2008) (excluding spouses, parents, and children of employers and also persons employed on "family farms." Family farm defined as paying out less than \$8,000 in cash wages); WIS. STAT. ANN. § 102.04(1)(c) (2007) (not applicable to farmers or farm labor, unless "on any 20 consecutive or nonconsecutive days during a calendar year employs 6 or more employees"); S.D. CODIFIED LAWS §§ 62-3-15, 16 (2006) (excluding farm or agricultural laborers, but applicable to operators of threshing machines and other harvesting machines for profit, but not if the operator is the owner of the crops being harvested); 820 ILL. COMP. STAT. ANN. 305/3-19 (West 2007) (not applicable to any agricultural enterprise "employing less than 400 working days of agricultural or aquacultural labor per quarter during the preceding calendar year" and also excluding immediate family members residing with the employer); MO. ANN. STAT. § 287.090(1) (West 2007) (generally not applicable to "farm labor"; farm labor not defined by statute).

workers' compensation because there is little risk of injury.³⁸ The farm employer cannot pass on the cost of workers' compensation to the consumer by simply raising the prices of his products.³⁹ Also, the administrative difficulty and associated cost of thousands of small farmers in managing insurance records and accounting matters is prohibitive.⁴⁰

These reasons are subverted in light of the statistics and modern trends in farming. Farming remains the second most dangerous occupation today,⁴¹ with a total of 507 deaths in crop and animal production in 2005.⁴² Moreover, increased use of pesticides and other chemicals endanger farm workers on a frequent basis.⁴³ Arguably, many farmers are passing on the costs of production and labor to consumers without losing a competitive advantage in light of rising profits.⁴⁴ Lastly, agricultural production is moving away from smaller family farms to larger grain and livestock operations with increased money management and profits.⁴⁵ Nevertheless, many workers' compensation exceptions still exist or do not cover agricultural labor at all.⁴⁶

B. *Agricultural Employers' Upper Hand over Unauthorized Farm Workers*

Under federal law, farm workers *with* work authorization are excluded under FLSA and the NLRA from many labor protections⁴⁷ that otherwise would

38. HARL, *supra* note 35 at § 20.03[1]; *White*, 243 U.S. at 208 (holding that "the risks inherent in these occupations are exceptionally patent, simple, and familiar").

39. LARSON, *supra* note 19, at 328.

40. *Id.* at 327.

41. *See supra* note 10.

42. *Id.* at 8.

43. *See* U.S. GEN. ACCOUNTING OFFICE, PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN 12 (2000), available at <http://www.gao.gov/new.items/rc00040.pdf> (noting EPA's 1999 nationwide estimate of 10,000-20,000 physician-diagnosed incidents of pesticide illnesses and injuries in farm work). *See* Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 501-03 (1998).

44. *See* JAMES MACDONALD ET AL., ECON. RESEARCH SER., USDA, ECONOMIC BRIEF NUMBER 6: GROWING FARM SIZE AND THE DISTRIBUTION OF FARM PAYMENTS 3 (2006), <http://www.ers.usda.gov/publications/EB6/EB6.pdf>. *See also* HARL, *supra* note 35, at § 20.03[1], n.4 (Mean household income among all U.S. farm operator households is higher than nationwide mean household income.).

45. MACDONALD ET AL., *supra* note 44, at 2.

46. KAN. STAT. ANN. § 44-505(a)(1) (West 2007); MO. ANN. STAT. § 287.090(1) (West 2007); N.D. CENT. CODE § 65-01-17 (West 2007); S.D. CODIFIED LAWS § 62-3-15 to -16 (2007).

47. Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(6) (2006) (excluding any employee in agriculture labor if his employer did not use more than five hundred man-days of agricultural labor in the preceding calendar; excluding employees employed as a hand harvest laborers and are paid on a piece rate basis in an operation that is generally recognized as paid on a

include the right to organize,⁴⁸ bargain,⁴⁹ strike,⁵⁰ and receive overtime pay for work over forty hours a week.⁵¹ Moreover, the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”) contains the same exclusions as the FLSA regarding collective bargaining ability.⁵² In practical terms, AWPA does nothing to give farm workers collective bargaining power to *improve* labor arrangements. Instead, it sets the minimum living conditions and contractual terms employers must provide for farm workers.⁵³ Unfortunately, farm workers do not have much recourse for improving labor conditions under state statutes in the Heartland either. Of the Midwestern states, only Wisconsin and Kansas have given agricultural workers collective bargaining power.⁵⁴ For these reasons, most hired farm workers in the Heartland are legally powerless to leverage better working conditions. Additionally, statistics suggest farm workers may not have the ability to fight for their rights due to education and language barriers.⁵⁵

Farm worker demographics indicate that this group is not well-equipped to fight for safer and improved working conditions. According to a 2005 National Agricultural Workers Survey report (“NAWS Report”) of farm workers studied from 2001-2002, the median highest education level completed was sixth grade, and only twenty-four percent of agricultural workers indicated they could speak English “well,” with eighty-one percent indicating Spanish as their first

piece rate basis in the region of employment; excluding migrant farm laborers that commute daily from their permanent residences to the farms on which they work and are employed less than thirteen weeks during the preceding calendar year; excluding agricultural laborers principally engaged in the range production of livestock); National Labor Relations Act (NLRA), 29 U.S.C. § 152(3) (2006) (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer . . .”).

48. 29 U.S.C. § 157.

49. *Id.*

50. 29 U.S.C. § 163.

51. 29 U.S.C. § 207(a)(1).

52. Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1803(a)(3) (2006).

53. 29 U.S.C. §§ 1811-1815 (requiring agricultural employers to obtain certificates of registry and undergo housing inspections); 29 U.S.C. § 1821(a) (requiring agricultural employers to provide detailed written disclosures of the working arrangements); 29 U.S.C. § 1823(a) (providing for minimum safety and health of housing); 29 U.S.C. § 1832(a) (ensuring agricultural workers will be paid for work performed); 29 U.S.C. §§ 1841(b)(1)(A), (C) (ensuring vehicles and farm machinery are insured and meet safety standards).

54. Michael H. LeRoy & Wallace Hendricks, *Should “Agricultural Laborers” Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 513 (1999); WIS. STAT. § 111.04 (2007); KAN. STAT. ANN. § 44-821 (2007).

55. *See generally* U.S. DEP’T OF LABOR, *supra* note 7, at 17 (giving the demographics for education literacy and English skills).

language.⁵⁶ Of the same survey, fifty-three percent of the hired crop labor force was unauthorized,⁵⁷ a status that reduces the likelihood of reporting unsafe conditions or unfair employment practices to legal authorities. These statistics suggest that it would be financially advantageous for agricultural employers to hire illegal immigrants. Employers would have little or no concern for increased labor costs or safety mechanisms that might slow production. Lack of effective federal immigration policy also favors employers when hiring farm workers.

The 1986 Immigration Reform and Control Act ("IRCA") made it illegal for an employer to knowingly hire a non-U.S. national without work authorization.⁵⁸ The rules of U.S. Citizenship and Immigration Services reveal that employers need only review documentation that "reasonably appears on its face to be genuine" in establishing identity and work authorization; there is no further burden placed on the employer to seek the true identity of the applicant.⁵⁹ On the other hand, by accepting employment via assumed identities, unauthorized farm workers subject themselves to possible fines up to \$2,000 per document⁶⁰ and jail time up to five years if they have forged documents for others.⁶¹ Such a legal policy allows unscrupulous employers to levy lack of legal immigration status against their unauthorized laborers to make them work in unfair and unsafe labor conditions under threat of U.S. Immigration and Customs Enforcement (ICE) raids and subsequent deportations.⁶²

Though employers use the threat of ICE and deportation as a means to force unauthorized farm workers into compliance, the reality is that immigration raids are infrequent and worksite enforcement is a low priority on ICE's agenda.⁶³ ICE has had difficulty enforcing immigration law against unscrupulous

56. *Id.* at 17-18, 21.

57. *Id.* at 6.

58. 8 U.S.C. § 1324a(a)(1)(A) (2006).

59. 8 U.S.C. § 1324a(b)(1)(A)(ii).

60. 8 U.S.C. § 1324c(d)(3)(A) (stating "not less than \$250 and not more than \$2,000 for each document that is the subject of a violation").

61. 8 U.S.C. § 1324c(e)(1) (stating any preparer who has willfully or knowingly failed to disclose or has concealed false documents in an application "shall be fined in accordance with Title 18, imprisoned for not more than five years, or both").

62. *See, e.g.* Beth Lyon, *Farm Workers in Illinois: Law Reforms and Opportunities for the Legal Academy to Assist Some of the State's Most Disadvantaged Workers*, 29 S. ILL. U. L.J. 263, 274-75 (2005) (addressing lopsided incentives for employers who knowingly hire unauthorized immigrants in order to have a docile workforce and providing examples of employer abuses of national immigration system).

63. U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 30 (2005), <http://www.gao.gov/new.items/d05813.pdf>.

employers because of the “genuine” document standard.⁶⁴ Employers easily thwart immigration law by claiming ignorance when illegal workers present false documents to complete I-9 employment forms.⁶⁵ ICE has had difficulty substantiating IRCA charges against employers because of its inability to prove employers willfully hired undocumented workers.⁶⁶ As a result, unscrupulous employers are not deterred by IRCA fines or ICE enforcement for hiring illegal workers.⁶⁷ IRCA’s ineffective deterrence and low rate of enforcement makes it easy for unscrupulous employers to hire illegal workers.⁶⁸ In the end, botched federal immigration policy, farm workers’ inability to bargain collectively, difficulty communicating, and lack of education combine to form an accessible, docile, and disposable workforce for unscrupulous employers.

III. THE PHYSICAL AND CHEMICAL DANGERS OF FARM WORK

The inherent risks of farming are not so “patent, simple, and familiar” today as Justice Pitney had described them in 1917.⁶⁹ Modern day farm workers still perform physically demanding and repetitive tasks such as harvesting, pruning, hoeing, and hand planting.⁷⁰ However, modern agricultural work also involves frequent use of heavy machinery and handling of pesticides and fertilizers. Strangely, introduction of these chemical and mechanical technologies in agriculture has not brought about similar worker protection laws that were developed during the early part of the Twentieth Century when millions of Europeans immigrated to the United States during the American Industrial Revolution.⁷¹

A. *Physical Injuries and Dangers Threatening Hired Farm Labor*

The physical risk of injury that farm workers face regularly is clear. In May 2001, the National Institute for Occupational Safety and Health (NIOSH) published findings of a national study carried out in 1995 (“NIOSH study”) involving 11,630 farming operations across the country.⁷² The NIOSH study found

64. *Id.* at 37.

65. *Id.*

66. *Id.*

67. *Id.* at 38.

68. *Id.*

69. *White*, 243 U.S. at 208.

70. U.S. DEP’T. OF LABOR, *supra* note 7, at 32-33.

71. See RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 6 (2006) (discussing new immigration restrictions due to America’s growth during the industrial revolution).

72. JOHN R. MYERS, NAT’L. INST. OF OCCUPATIONAL SAFETY & HEALTH, CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T. OF HEALTH & HUMAN SERVICES, *INJURIES AMONG*

that there were 6.8 lost-time injuries per 200,000 work hours (about 100 workers) in 1995.⁷³ The leading cause of lost-time work injuries was farm machinery (21.3%), followed by livestock (20.0%) and working surfaces (8.5%).⁷⁴ Non-fatal tractor injuries contributed an additional 4.1%.⁷⁵ Moreover, NIOSH calculates that 101 farm workers are killed in tractor rollovers per year, and every day approximately 243 agricultural workers suffer lost-work-time injuries of which an estimated five percent result in permanent physical impairment.⁷⁶

These statistics have not gone unnoticed. The federal government has attempted to regulate farming dangers. OSHA has in place several regulations for farm machinery, which include protective rollover structures and related tests for tractors,⁷⁷ protective enclosures for wheel-type tractors,⁷⁸ and guarding on farm field equipment.⁷⁹ Nonetheless, the rates of injury are still high and it is difficult to effectively enforce these kinds of regulations given OSHA's lack of administrative resources.⁸⁰ In light of the traumatic injury rates in farm work, it is unsettling that there are few if any compensation mechanisms in place to serve farm workers injured on the job.

Farm workers do not suffer from traumatic injuries alone. Familiar farm work like harvesting, pruning, and planting by hand present long term physical problems for farm workers. Cumulative musculoskeletal trauma in agriculture is possibly the least recognized occupational hazard:

There is ample evidence of widespread exposure of those who work in agriculture to severe ergonomic risk factors on a daily basis. In many cases, risk factor exposures can exceed those found in some of the non-agricultural industries now commonly cited as among the most hazardous for musculoskeletal disorders.⁸¹

FARM WORKERS IN THE UNITED STATES 1995, 9 (2001), <http://www.cdc.gov/niosh/childag/pdfs/intro.pdf>.

73. *Id.*

74. *Id.*

75. *Id.* at 1.

76. NAT'L INST. OF OCCUPATIONAL SAFETY & HEALTH, CENTERS FOR DISEASE CONTROL & PREVENTION, AGRICULTURAL SAFETY, <http://www.cdc.gov/niosh/topics/aginjury/> (last visited Feb. 28, 2008).

77. 29 C.F.R. § 1928.51 (2007).

78. 29 C.F.R. § 1928.53 (2007).

79. 29 C.F.R. § 1928.57 (2007).

80. See Orly Norbel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1080-81 (2005) (addressing OSHA's limited financial and personnel resources).

81. Larry Chapman & James Meyers, *Ergonomics and Musculoskeletal Injuries in Agriculture: Recognizing and Preventing the Industry's Most Widespread Health and Safety Problem*, <http://origin.cdc.gov/nasd/docs/d001701-d001800/d001771/d001771.pdf>.

Generally, there are three recognized risk factors common to agricultural work: heavy lifting and/or carrying of loads over fifty pounds, full body bending or “stooping,” and repetitive hand work, such as cutting or clipping.⁸² These risk factors have meaning. The yearly reported prevalence rate of back pain among agricultural workers was one and a half times higher than the average rate for all U.S. industries.⁸³

Unfortunately, information on musculoskeletal injuries to farm workers is difficult to come by. Researchers point to several reasons for the lack of data. The U.S. Bureau of Labor Statistics only collects data on musculoskeletal health problems from farms with eleven or more employees.⁸⁴ Generally, farm workers are not covered by workers compensation insurance and have little incentive to report injuries.⁸⁵ Also, researchers have recognized cultural barriers (stoicism) that impede gathering information about pain and injury, and suspect workers that develop problems leave the agricultural sector entirely.⁸⁶

Nevertheless, some available statistics enable realistic deductions. The unauthorized workforce in agriculture was estimated at 1.2 million in 2002.⁸⁷ Potentially, thousands of unauthorized workers may be suffering compensable musculoskeletal injuries from harvesting and manual labor practices. Further, of the 59,888 traumatic injuries among hired farm workers of the NIOSH study, Hispanics accounted for almost fifty-two percent nationally.⁸⁸ Hispanics also ranked second in injuries according to ethnic origin (16.8%) behind whites (81.3%) as early as 1995.⁸⁹ The need for data and statistics make it difficult to determine exact numbers of unauthorized farm workers who suffer cumulative musculoskeletal or traumatic injuries. However, the available data, high rate of physiological injury, and obvious risk factors make it clear that there is need for workers’ compensation or other worker protections to prevent exploitation of unauthorized farm workers in agriculture.

B. *Chemical Injuries and Dangers Threatening Hired Farm Labor*

Chemical injuries and illnesses present a less obvious occupational risk to agricultural workers. The EPA has estimated that 950 million pounds of pesti-

82. *Id.* (citing J. Meyers et al., High Risk Tasks for Musculoskeletal Disorders in Agricultural Field Work, Address at the American Public Health Association (1998)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. LOWELL, *supra* note 5, at 8.

88. MYERS, *supra* note 72, at 2.

89. *Id.* at 1.

cides are used in the U.S. agricultural industry each year.⁹⁰ Farm workers are inevitably in contact with and suffer from pesticide exposure by proximity.

Farmworkers make up one of the “primary populations” exposed to pesticides, and they suffer the highest rate of illness caused by chemical exposure across industries. Acute effects of pesticide exposure include headaches, fatigue, nausea, skin rashes, eye irritation, flu-like symptoms, first or second degree chemical burns, paralysis and death. Chronic illnesses that have been associated with prolonged pesticide exposure include various types of cancer, neurological disorders, and reduced cognitive skills.⁹¹

The Federal government recognized these dangers and has created a regulatory scheme to protect agricultural workers from exposure to pesticides. In 1987, the Secretary of Labor enacted a Field Sanitation Standard by authority of the Occupational Safety and Health Act (“OSHA”).⁹² The sanitation standard requires agricultural employers with eleven or more employees to provide drinking water, toilet facilities, and hand-washing stations and reasonable access to these facilities.⁹³ A central reason for the agency’s regulation was so farm laborers would be able to reduce exposure to pesticides through use of hand-washing facilities.⁹⁴

Additionally, the Environmental Protection Agency (EPA) updated regulations in 1992 under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), which is the current Worker Protection Standard.⁹⁵ The Worker Protection Standard mandates that agricultural employers follow the label instructions of a pesticide according to FIFRA,⁹⁶ follow time restrictions on worker re-entry into fields;⁹⁷ provide notice to workers of the time and location of pesticide application;⁹⁸ post pesticide safety information that all workers will understand;⁹⁹

90. U.S. GEN. ACCOUNTING OFFICE, *supra* note 43, at 5.

91. Laura Lockard, *Toward Safer Fields: Using AFWPA's Working Arrangement Provisions to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 N.Y.U. REV. L. & SOC. CHANGE 507, 510-11 (2004).

92. 29 U.S.C. §§ 651, 655 (2006); 29 C.F.R. § 1928.110 (2007).

93. 29 C.F.R. § 1928.110(a), (c)(1)(i), (c)(2)(iii).

94. Lockard, *supra* note 91, at 512 (*citing* 52 Fed. Reg. 16,059-61 (May 1, 1987) (codified at 29 C.F.R. § 1928) (noting that ninety-eight to ninety-nine percent of chronic exposure to agrichemical residues is through the skin of arms and hands)).

95. Lockard, *supra* note 91, at 513; 57 Fed. Reg. 38,102, 38,151 (Aug. 21, 1992) (codified at 40 C.F.R. § 170.7 (2007)).

96. 40 C.F.R. § 170.9 (2007) (Under FIFRA it is unlawful for a person “to use any registered pesticide in a manner inconsistent with its labeling.”).

97. 40 C.F.R. § 170.112 (2007) (“agricultural employer shall not allow or direct any worker to enter or remain in the treated area before the restricted-entry interval specified on the pesticide labeling has expired”).

98. 40 C.F.R. § 170.222 (2007) (employer must provide specific information about time and place of pesticide application).

certify extensive pesticide safety training to laborers;¹⁰⁰ provide personal protective equipment and means for decontamination according to pesticide labels;¹⁰¹ and give emergency assistance in the event of accidental poisoning or illness.¹⁰² In theory, the OSHA regulations and EPA's Worker Protection Standards provide ample protection from pesticide exposure for farm workers.

Unfortunately, lack of administrative resources make OSHA and EPA regulations "paper tigers," which leaves many farm workers vulnerable to pesticide exposures and physical dangers. In fiscal year 2006, OSHA carried out 38,579 total worksite inspections in all industries,¹⁰³ though there were an estimated 115 million workers between 7.1 million worksites across the U.S. in 2004.¹⁰⁴ OSHA recognizes it would only be able to visit each worksite across all industries approximately once every 167 years if it visited every site.¹⁰⁵

Subsequently, OSHA prioritizes industries with high illness/high injury rates, though agricultural production is not counted among them.¹⁰⁶ The number of farms in the Heartland demonstrates the impracticality for OSHA and EPA to enforce their own regulations. In 2002, Heartland farms numbered in the thousands: North Dakota (30,619),¹⁰⁷ South Dakota (31,736),¹⁰⁸ Nebraska (49,355),¹⁰⁹

99. 40 C.F.R. § 170.235 (2007) (pesticide safety poster must be posted communicating basic safety concepts to workers).

100. 40 C.F.R. § 170.230 (2007) (employer must assure the pesticide handler-employee has been certified within the last five years according to regulation).

101. 40 C.F.R. § 170.240 (2007) (employer must provide personal protective equipment according to pesticide label specifications); 40 C.F.R. § 170.250 (2007) (employer shall provide for decontamination supplies of personal protective equipment).

102. 40 C.F.R. § 170.260 (2007) (employer must provide transportation to an emergency medical facility in case of pesticide spill or emergency).

103. OSHA, U.S. Dep't. of Labor, OSHA Enforcement: Vital to a Safe and Healthy Workforce, http://osha.gov/dep/enforcement/enforcement_results_06.html (last visited Feb. 28, 2008).

104. Elizabeth A. Lambrecht Karels, *Make Employers Accountable for Workplace Safety! How the Dirty Little Secret of Workers' Compensation Puts Employees at Risk and Why Criminal Prosecution and Civil Action Will Save Lives and Money*, 26 *HAMLIN J. PUB. L. & POL'Y* 111, 136 (2004).

105. Secretary of Labor Elaine Chao, Speech to the Voluntary Protection Program Participants Association (Aug. 27, 2001), available at http://www.dol.gov/_sec/media/speeches/20010827_VPPA.htm.

106. See OSHA, *supra* note 103 (In 2003, OSHA targeted seven industries with highly proportioned illness/injury rates, including landscaping and horticultural services, oil and gas field services, fruit and vegetable processing, blast furnace and basic steel products, ship and boat building and repair, public warehousing and storage, and concrete and concrete products.).

107. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE - NORTH DAKOTA I (2002), <http://www.nass.usda.gov/census/census02/profiles/nd/cp99038.PDF>.

Kansas (64,414),¹¹⁰ Missouri (106,797),¹¹¹ Illinois (73,027),¹¹² Wisconsin (77,131),¹¹³ Minnesota (80,839),¹¹⁴ and Iowa (90,655).¹¹⁵ Further, the average annual number of hired workers in 2006 was also in the thousands: Kansas, Nebraska, and the Dakotas (Northern Plains) had 33,500; Iowa and Missouri (Corn Belt II) had 27,000; and Minnesota, Wisconsin and Michigan (Lakes Region) had 61,300.¹¹⁶ In 2006, twenty-eight to thirty-one percent of farms across the country hired over fifty workers, and an additional twenty-six percent hired over ten workers¹¹⁷ at peak harvest times to trigger OSHA and EPA compliance.¹¹⁸ To make matters worse, out of the Heartland states, only Iowa and Minnesota have approved state OSHA programs that meet federal standards for upholding federal law.¹¹⁹ Practically, it is impossible for OSHA to enforce its own regulations, which potentially leave thousands of unauthorized farm workers exposed to dan-

108. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE – SOUTH DAKOTA 1 (2002), <http://www.nass.usda.gov/census/census02/profiles/sd/cp99046.PDF>.

109. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE – NEBRASKA 1 (2002), <http://www.nass.usda.gov/census/census02/profiles/ne/cp99031.PDF>.

110. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE – KANSAS 1 (2002), <http://www.nass.usda.gov/census/census02/profiles/ks/cp99020.PDF>.

111. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE – MISSOURI 1 (2002), <http://www.nass.usda.gov/census/census02/profiles/mo/cp99029.PDF>.

112. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE – ILLINOIS 1 (2002), <http://www.nass.usda.gov/census/census02/profiles/il/cp99017.PDF>.

113. NAT'L AGRIC. STATISTICS SERV., USDA, 2002, CENSUS OF AGRICULTURE: STATE PROFILE – WISCONSIN (2002), <http://www.nass.usda.gov/census/census02/profiles/wi/cp99055.PDF>.

114. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE – MINNESOTA 1 (2002), <http://www.nass.usda.gov/census/census02/profiles/mn/cp99027.PDF>.

115. NAT'L AGRIC. STATISTICS SERV., USDA, 2002 CENSUS OF AGRICULTURE: STATE PROFILE – IOWA (2002), <http://www.nass.usda.gov/census/census02/profiles/ia/cp99019.PDF>.

116. NAT'L AGRIC. STATISTICS SERV., USDA, FARM LABOR 14 (Nov. 16, 2006), http://usda.mannlib.cornell.edu/usda/nass/FarmLabo//2000s/2006/FarmLabo-11-17-2006_revision.pdf.

117. *Id.* at 12 (adding figures for 11-20 workers and 21-50 workers for the July 9-15 and Oct. 8-14, 2006 periods).

118. 29 C.F.R. § 1928.110 (2007) (OSHA Field Sanitation Standards only apply to agricultural operations that employ over ten workers.); 40 C.F.R. § 1928.110 (2007) (The Worker Protection Standard applies to agricultural operations with eleven or more employees working in the fields in a day.).

119. *See* OSHA, U.S. Dept. of Labor, State Occupational Safety and Health Plans, <http://www.osha.gov/dcsp/osp/index.html> (last visited Feb. 29, 2008) (providing a site with links to information discussing the various state Occupational Safety and Health plans).

gerous employment conditions and work injuries without compensation. Without better worker protections, unscrupulous farm employers are at liberty to maintain substandard working conditions for larger profits at the expense of many unauthorized workers.

IV. UNAUTHORIZED WORKERS' PROTECTIONS IN COURT

The millions of unauthorized immigrants living and working in the United States have created a body of case law concerning workers' compensation coverage under state statutes.¹²⁰ A split of authority among the states clouds whether undocumented employees are entitled to workers' compensation.¹²¹ Several states have determined that workers' compensation statutes cover unauthorized aliens,¹²² but no cases have addressed protections for unauthorized agricultural workers. This makes it possible for some agricultural employers to dismiss unauthorized workers upon injury without expense or concern for labor conditions.

Other than outlawing unauthorized employment by federal law,¹²³ there is a range of policies among the states regarding unauthorized workers' compensation if they are injured on the job.¹²⁴ No policy exists in the Heartland regarding unauthorized farm workers and workers' compensation. In the end, State workers' compensation statutes and federal immigration policy intersect to create potentially unfair competitive advantages and questionable working conditions in states whose employers are not forced to cover workers' compensation expenses for unauthorized workers. Unfortunately, the U.S. Supreme Court has only addressed wrongful terminations in regard to protections for unauthorized workers.¹²⁵

120. See generally Marjorie A. Shields, Annotation, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523 (2004) (providing a collection of state cases applying workers' compensation laws to illegal aliens).

121. *Id.*

122. See *Correa*, 664 N.W.2d 324; *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998); *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004); *Rivera v. Trapp*, 519 S.E.2d 777 (N.C. Ct. App. 1999); *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671 (Colo. Ct. App. 1997).

123. 8 U.S.C. § 1324(a)(3)(A).

124. See, e.g., WYO. STAT. ANN. § 27-14-102(a)(vii) (2007) (excluding workers not authorized by U.S. Citizenship and Immigration Services from coverage); *Dowling*, 712 A.2d at 409 (finding in favor of covering unauthorized immigrants under state workers compensation).

125. *Continental Pet Techs., Inc. v. Palacias*, 604 S.E.2d 627 (Ga. Ct. App. 2004), *cert. denied*, 546 U.S. 825 (2005) (The U.S. Supreme Court denied certiorari on this case in which the Court of Appeals of Georgia held that the IRCA did not preempt state workers' compensation law.).

A. *Federal Immigration and Labor Policy in Hoffman Plastic*

In 2002, the Supreme Court handed down its *Hoffman Plastics* decision addressing the National Labor Relations Board's (NLRB) backpay remedy for the wrongful termination of an unauthorized worker.¹²⁶ Several employees had been dismissed from a plastics factory for their union-organizing efforts. During litigation, it was discovered that one of the terminated employees, Jose Castro, had presented false documents upon hire and lacked work authorization during his tenure of employment.

Initially, the administrative law judge had ruled against Castro's backpay demand, but the Appeals Board reversed, reasoning that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."¹²⁷ The Supreme Court granted certiorari and reversed Castro's \$66,951 backpay award in a 5-4 decision authored by Chief Justice Rehnquist. The Court held that the NLRB's backpay award to Castro trivialized the statutory policy of the Immigration Reform and Control Act.¹²⁸ The Court refused to reward an unauthorized worker who had thwarted the IRCA. Awarding backpay to illegal aliens "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."¹²⁹

In stark contrast, the dissenters found nothing in the NLRB's backpay award that was against IRCA's policy.¹³⁰ Instead, Justice Breyer focused on deterring the economic attraction between undocumented immigrants and unscrupulous employers:

For one thing, the general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a "magnet" pulls illegal immigrants towards the United States.

....

To *deny* the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of

126. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

127. *Id.* at 141 (citing *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1060 (1998)).

128. *Id.* at 149.

129. *Id.* at 151.

130. *See id.* at 153.

an initial labor law violation. . . . It thereby increases the employer's incentive to find and to hire illegal-alien employees.¹³¹

In policy terms, state and federal governments' unwillingness to provide protections (here, remedial backpay) for unauthorized workers naturally creates economic incentives for employers to hire unauthorized immigrants.

This same logic of economic deterrence applies to workers' compensation protections. If employers know that they will not be liable for expenses of unauthorized worker injuries, then they naturally have a financial incentive to find and hire unauthorized workers. In the least, some employers will look the other way and accept documents that are known to be false under the pretext that they are "reasonably genuine."¹³² This incentive is amplified in the agricultural context where many agricultural employers are not subject to workers' compensation liability. Workers' compensation claims brought against farm employers would force them to improve injurious conditions or face increased labor costs.

B. *Unauthorized Employees and Workers' Compensation in the Heartland*

Workers' compensation coverage for unauthorized agricultural workers is a tabula rasa in the Heartland. Only Kansas and Minnesota have addressed workers' compensation protections for unauthorized workers, and neither case involved agriculture.¹³³ In *Doe v. Kansas Department of Human Resources*, an unauthorized alien claimant, Delia Butanda, had been compensated for "\$57,936.72 in temporary total and permanent partial general disability compensation" under an assumed identity.¹³⁴ Butanda's real identity was later found out by a state investigative unit and reported.¹³⁵ Subsequently, the state Secretary of Human Resources ruled in an administrative decision that Butanda had committed fraud in obtaining workers' compensation benefits.¹³⁶ She was penalized \$5,000 plus costs for use of an assumed identity and social security number under oath.¹³⁷

131. *Id.* at 155.

132. 8 U.S.C. § 1324a(b)(1)(A)(ii) (An employer is in compliance with the IRCA's employment verification system "if the document reasonably appears on its face to be genuine. If an [applicant] provides a document or combination of documents that reasonably appears on its face to be genuine," then the employer need not require more verification of identity.).

133. *See Doe v. Kansas Dep't of Human Res.*, 795 P.3d 940 (Kan. 2004); *see also Correa*, 664 N.W.2d 324.

134. *Doe*, 795 P.3d at 949.

135. *Id.* at 944.

136. *Id.* at 944-45.

137. *Id.* at 944.

The Supreme Court of Kansas upheld the decision for the reason that the claimant “intentionally and willfully concealed the material fact of her true identity in the [workers’ compensation] proceedings”¹³⁸ The Kansas Court determined that the final order by the state Secretary was not unconstitutionally based on Butanda’s alienage.¹³⁹ Instead, the Kansas Court affirmed that she was being fined for “intentionally and willfully using a false identity throughout the workers compensation proceedings.”¹⁴⁰ The Kansas Court excused the employer, National Beef Packing (NBP) from any wrongdoing:

NBP knew or should have known that Butanda was an undocumented alien and yet was willing to look the other way when it hired her. NBP’s complicity does not change the fact that Butanda filed an application for workers compensation benefits using a false identity and continued to identify herself by the assumed name under oath throughout those proceedings.¹⁴¹

The Kansas Court attempted to confine its ruling to the identity fraud committed by Butanda in the workers’ compensation proceedings. The Court focused on penalizing her for using a false identity rather than for her alien status.¹⁴²

However, the *Doe* decision may be interpreted such that any undocumented worker injured on the job must disclose his real identity in workers compensation proceedings or face a civil penalty for fraud if caught. This forced disclosure automatically triggers violations of the IRCA,¹⁴³ which will deter unauthorized immigrants from making workers’ compensation claims because it risks intervention by federal immigration officials. The decision will likely result in fewer workers’ compensation claims filed by unauthorized workers, and maintain (or worsen) poor working conditions for both authorized and un-authorized workers. Despite any complicity and causation on their behalf, unscrupulous employers will benefit with lower labor costs. Alternatively, if compensation claims are filed, the *Doe* decision gives unauthorized workers more reason to cling to their assumed identities and promote identity fraud.

The *Doe* ruling does not address agricultural employment, though the decision leaves farm workers in a somewhat worse position. The *Doe* ruling indicates that unauthorized workers under Kansas law must disclose their identity in workers’ compensation proceedings or face the possibility of dismissal of their

138. *Id.* at 948.

139. *Id.* at 949.

140. *Id.*

141. *Id.* at 950.

142. *Id.* at 949.

143. 8 U.S.C. § 1324a(a); 8 U.S.C. § 1324c(a).

complaint.¹⁴⁴ Unauthorized farm workers have no access to workers compensation proceedings; and with *Doe*, they have no incentive to report an injury for fear of exposure to immigration officials. They work at their own risk of injury, while employers are free of concern for compensation claims or labor costs. Similar circumstances may exist in the Dakotas and Missouri, where there are no rulings on workers' compensation coverage for unauthorized immigrants, though agricultural labor is categorically exempt from required coverage.¹⁴⁵ A new policy should be passed in state legislatures to deter farm employers from exploiting unauthorized immigrants in the fields by extending workers' compensation coverage to hired farm labor, regardless of immigration status.

On a positive note, the Kansas Supreme Court recently handed down a decision in March of 2007 upholding an undocumented worker's right to unpaid wages under the Kansas Wage Payment Act.¹⁴⁶ The Court analogized the workers compensation protections it provided to unauthorized immigrants in the *Doe* decision to extend wage protections to an unauthorized restaurant worker who had been intentionally shorted in wages.¹⁴⁷ Hopefully, courts and state legislatures will find that the same worker protections that apply in other industries deserve recognition in the agricultural sector in light of the development of farm businesses.

Similar to the Kansas Court's workers' compensation ruling in *Doe*, the Minnesota Supreme Court extended coverage of workers compensation to unauthorized workers.¹⁴⁸ In *Correa v. Waymouth Farms*, an unauthorized employee, Fernando Correa, injured his back picking orders in a warehouse.¹⁴⁹ His injury forced him to undergo lower back surgery which resulted in work restrictions, and the loss of a second job with a delicatessen.¹⁵⁰ After Correa returned to Waymouth Farms from physical therapy, he worked light duty under work restrictions for a month and a half.¹⁵¹

Shortly thereafter, management terminated his employment because the Immigration and Naturalization Services reported it had discovered his alien registration and social security number did not match and he could not produce the

144. *Doe*, 90 P.3d at 950; KAN. STAT. ANN. § 44-5,120 (2007) (The Commissioner has the power to order a hearing on suspected fraudulent practices and dismiss the complaint without appeal.).

145. N.D. CENT. CODE § 65-01-17 (2007); S.D. CODIFIED LAWS §§ 62-3-15 to 17 (2007); MO. ANN. STAT. § 287.090 (West 2007).

146. *Coma Corp. v. Kan. Dep't of Labor*, 154 P.3d 1080, 1081 (Kan. 2007).

147. *Id.* at 1092.

148. *Correa*, 664 N.W.2d at 331.

149. *Id.* at 326.

150. *Id.*

151. *Id.*

correct documents.¹⁵² Correa was unable to find new employment after his dismissal.¹⁵³ Subsequently, Waymouth Farms filed petitions to discontinue Correa's compensation benefits, arguing that as a matter of law under the IRCA, Correa was not able "to perform a reasonable and diligent job search as required by" Minnesota Workers' Compensation law.¹⁵⁴

The Minnesota Court affirmed the lower courts' rulings that Correa had conducted a diligent job search and upheld Correa's benefits.¹⁵⁵ It noted that the focus of the IRCA was to prevent employers from hiring unauthorized immigrants.¹⁵⁶ The Minnesota Court determined that the purpose of the Minnesota Workers' Compensation Act (hereinafter the Act) was to consider the expense of the injury to the worker as an expense of production; it served no punitive purpose.¹⁵⁷ It recognized that "the IRCA was not intended to preclude the authority of states to award workers' compensation benefits to unauthorized aliens."¹⁵⁸ Correa clearly fit under the Act's definition of "employee," and the legislature had never intended to exclude unauthorized aliens from coverage.¹⁵⁹ Despite Waymouth Farm's arguments under the *Hoffman Plastics* decision, the Minnesota Court determined it was unnecessary to rule on such a policy question and left unauthorized worker protections for the legislature.¹⁶⁰

The *Correa* decision focused on the core of workers' compensation policy: shift the burden of the injury from the worker to the cost of business. Such a policy promotes safer work environments because it creates financial pressure for the employer to maintain safe and healthy working conditions for employees which in turn minimizes labor expenses. This financial pressure does not exist for many agricultural employers because of the loophole created by the agricultural exemption, and the ineligibility of unauthorized employees under workers' compensation. Iowa, Minnesota, Wisconsin, and Illinois provide some measure of protection for hired farm labor if certain quotas are met,¹⁶¹ but Minnesota is the only state that has ruled in favor of unauthorized workers' compensation coverage.

152. *Id.*

153. *Id.* at 326-27.

154. *Id.* at 327 (citing MINN. STAT. § 176.101 (2002)).

155. *Id.* at 331.

156. *Id.* at 329.

157. *Id.* at 328.

158. *Id.* at 329.

159. *Id.*

160. *Id.* at 331.

161. IOWA CODE § 85.1(3); MINN. STAT. ANN. § 176.041(1)(b); WIS. STAT. ANN. § 102.04; 820 ILL. COMP. STAT. ANN. 305/3.

V. CONCLUSION

Agricultural workers' compensation laws in the Heartland create a situation that is ripe for exploitation of unauthorized immigrants. Agricultural operations have the ability to maintain working conditions geared towards maximum production with minimal or no financial consequences for worker injuries. Hired farm laborers are ill-equipped to fight for basic employment rights considering sociological and language barriers. The physical and chemical dangers in agriculture deserve recognition and intervention by the state legislatures in the Heartland and the federal government through sound immigration policy. Legislation must be passed to reduce, if not end, the financial attraction unscrupulous farm employers have in hiring unauthorized immigrants. Heavier economic pressures must be placed on agricultural employers to deter them from hiring unauthorized immigrants "with a wink and a nod."¹⁶² Subjecting unscrupulous farm employers to workers' compensation labor costs will ultimately improve labor conditions for all farm employees and reduce instances of abusive employer practices.

162. *Hoffman Plastic*, 535 U.S. at 156.